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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF OREGON

9 CAROL A. GANN,

Civil No. 05-6260-AA
OPINION AND ORDER

10 Plaintiff,

11 vs.

12 JO ANNE B. BARNHART,
13 Commissioner of Social Security,

14 Defendant.

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32 AIKEN, Judge:

33 Claimant, Carol Gann, brings this action pursuant to the
34 Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain

judicial review of a final decision of the Commissioner. The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) disability benefits under Title XVI. 42 U.S.C. §§ 405(g), 1383(c)(3). For the reasons set forth below, the Commissioner's decision is adopted and this case is dismissed.

PROCEDURAL BACKGROUND

Plaintiff protectively filed her application for SSI benefits on October 15, 1998, and agreed with Administrative Law Judge (ALJ) Dilley to a stipulated period of disability ending September 30, 2000. Tr. 60-67. Plaintiff filed a second application for SSI on June 18, 2001, and stipulated as to her onset of disability. Tr. 454-56, 1015.

Plaintiff's applications were denied initially, and upon reconsideration. Plaintiff then requested a hearing before an ALJ. Tr. 449. On August 18, 2003, ALJ DeLaittre issued a decision denying plaintiff's application for disability. Tr. 22-32. The Appeals Council denied plaintiff's request for review making the ALJ's decision the final agency decision. See 20 C.F.R. §§ 404.981, 416.1481, 422.210.

STATEMENT OF THE FACTS

Plaintiff was 44 years old at the time of the hearing. Tr. 31, 107. She was considered a younger individual. 20 C.F.R. § 416.963(b). Plaintiff completed a GED in 1982. Tr. 31, 468. Her past work had been as a cashier, motel maid, and waitress. Tr. 31, 463. Plaintiff had not engaged in any substantial gainful activity since June 2001. Tr. 31.

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STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusions." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. § 423(d)(1)(A).

The Secretary has established a five-step sequential process for determining whether a person is disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502, 416.920. First the Secretary determines whether a claimant is engaged in "substantial gainful activity." If so, the claimant is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b).

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In step two the Secretary determines whether the claimant has a "medically severe impairment or combination of impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R. §§ 404.1520(c), 416.920(c). If not, the claimant is not disabled.

In step three the Secretary determines whether the impairment meets or equals "one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity." *Id.*; see 20 C.F.R. §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively presumed disabled; if not, the Secretary proceeds to step four. *Yuckert*, 482 U.S. at 141.

In step four the Secretary determines whether the claimant can still perform "past relevant work." 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can work, she is not disabled. If she cannot perform past relevant work, the burden shifts to the Secretary. In step five, the Secretary must establish that the claimant can perform other work. Yuckert, 482 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) & (f). If the Secretary meets this burden and proves that the claimant is able to perform other work which exists in the national economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

DISCUSSION

(1) The ALJ's Findings

In a prior hearing, on December 29, 2000, ALJ Dilley found that plaintiff's severe impairments of anxiety, depression, post-traumatic stress disorder (PTSD), and Grave's disease, prevented

1 her from performing any sustained work activity from October 15,
2 1998, through September 30, 2000. Tr. 25, 63-67. After this
3 date plaintiff was able to return to her past relevant work. Tr.
4 26. The decision was in accord with plaintiff's stipulation to
5 a closed period of disability, and she did not appeal or request
6 further reconsideration of that determination. Tr. 26, 63-67.

7 In order for plaintiff to qualify for disability benefits
8 under her current application, she must demonstrate changed
9 circumstances indicating a greater level of disability since the
10 date of her earlier decision; December 29, 2000. See Chavez v.
11 Bowen, 844 F.2d 691 (9th Cir. 1988). The burden is on the
12 claimant to prove that she is disabled within the meaning of the
13 Act. Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999).

14 At step one, the ALJ found that plaintiff had not engaged
15 in substantial gainful activity since the alleged onset date,
16 June 18, 2001. Tr. 26, Finding 1. See 20 C.F.R. § 416.920(b).
17 This finding is not in dispute.

18 At step two, the ALJ found that plaintiff had severe
19 impairments of depressive disorder, anxiety disorder, and PTSD.
20 Tr. 31, 19, Finding 2. See C.F.R. § 416.920(c). This finding is
21 in dispute.

22 At step three, the ALJ found that plaintiff's impairments
23 did not meet or equal the requirements of a listed impairment.
24 Tr. 31, Finding 2. See 20 C.F.R. §§ 416.920(a)(4)(iii),
25 416.920(d). This finding is in dispute.

26 The ALJ determined that plaintiff had the residual
27 functional capacity (RFC) to perform simple tasks. Tr. 32,
28 Finding 4. See 20 C.F.R. §§ 416.920(e), 416.945. This finding

1 is in dispute.

2 At step four, the ALJ found that plaintiff was able to
3 perform her past relevant work. Tr. 32, Finding 4. See 20
4 C.F.R. §§ 416.920(a)(4)(iv), 416.920(f). This finding is in
5 dispute. Because the ALJ found plaintiff not disabled at step
6 four, he did not address step five of the sequential evaluation
7 process. Tr. 31. See 20 C.F.R. §§ 416.920(a)(4)(v), 416.920(g).

8 (2) Plaintiff's Assertions of Error

9 A. ALJ's Finding of Certain Impairments as Non-Severe

10 Plaintiff alleges that the ALJ erred when he found certain
11 impairments "non-severe." Step two of the 5-Step Sequential
12 Analysis, 20 C.F.R. § 404.1520(c), sets forth the requirement
13 that a claimant have a "serious impairment," stating, "If you do
14 not have any impairment or combination of impairments which
15 significantly limits your physical or mental ability to do basic
16 work activities, we will find that you do not have a severe
17 impairment and are, therefore, not disabled. Id. "A claim may
18 be denied at step two only if the evidence shows that the
19 individual's impairments, when considered in combination, are not
20 medically severe, i.e., do not have more than a minimal effect on
21 the person's physical or mental ability(ies) to perform basic
22 work activities." Social Security Ruling 85-28. Further, the
23 Ninth Circuit has held that "an impairment or combination of
24 impairments can be found "not severe" only if the evidence
25 establishes a slight abnormality that has "no more than a minimal
26 effect on an individual's ability to work." Tackett v. Apfel,
27 180 F.3d 1094, 1098 (9th Cir. 1999) (internal citation omitted).
28 A non-severe impairment is one that "does not significantly limit

1 your physical or mental ability to do basic work activities." 20
2 C.F.R. § 416.921(a). 'Basic work activities' include physical
3 functions such as walking, standing, sitting, lifting, pushing,
4 pulling, reaching, carrying, or handling; capacities for seeing,
5 hearing and speaking; understanding, carrying out, and
6 remembering simple instructions; use of judgment; responding
7 appropriately to supervision, co-workers and usual work
8 situations; and dealing with changes in a routine work setting.
9 20 C.F.R. § 416.921(b)(1)-(6).

10 Specifically, plaintiff argues that the ALJ erred in not
11 assessing plaintiff's myoclonic jerking, diffused myoclonus,
12 hyperflexia, episodic upper extremity numbness, degenerative disc
13 disease, and fibromyalgia as a severe impairment. Plaintiff's
14 Opening Brief, p. 16-17. Plaintiff bears the burden to establish
15 the existence of a severe impairment that prevented her from
16 performing substantial gainful activity, and that this impairment
17 lasted for at least twelve continuous months. 20 C.F.R. §§
18 416.905, 616.912.

19 The ALJ did note various symptoms and complaints in the
20 record, however, he found they were transient and did not cause
21 significant vocational limitations. Tr. 26. He also noted that
22 since the prior ALJ decision on December 29, 2000, plaintiff had
23 not demonstrated a worsening of her physical or mental condition,
24 or the addition of any other severe impairment. Tr. 27. I
25 agree.

26 The ALJ relied on the report of Dr. William Salvador, who
27 examined plaintiff in October 2001 and noted that plaintiff's
28 jerking episodes were improved by Valium and that other than

1 slight anxiety her mental status was otherwise intact. Tr. 27-
 2 28, 567-68. Dr. Salvador assessed a global assessment of
 3 functioning (GAF) score of 55. Tr. 28, 569. This score is
 4 indicative of a person with "moderate symptoms (e.g., flat affect
 5 and circumstantial speech, occasional panic attacks) or moderate
 6 difficulty in social, occupational, or school functioning (e.g.,
 7 few friends, conflicts with peers or co-workers)."¹

8 Plaintiff was examined in June 2002 by Judith Eckstein,
 9 Ph.D, who noted that plaintiff's IQ was in the 80's, and that her
 10 concentration was okay. Tr. 809-16. Dr. Eckstein opined that
 11 plaintiff could perform "lower level types of employment." Tr.
 12 813. Dr. Eckstein examined plaintiff again in June 2003, and
 13 again noted that plaintiff's mental status was within normal
 14 limits of her IQ level. Tr. 805-08. She assessed a GAF score of
 15 55 and added that plaintiff's depression appeared to be
 16 situational in part, due to her financial situation. Id.

17 Regarding plaintiff's Grave's disease, plaintiff's treating
 18 physician, Dr. Davies, reported in September 2001, that plaintiff
 19 was well appearing, had no tremors, and was not hypothyroid as a
 20 result of her therapy. Tr. 559-64. In June 2003, Dr. Davies
 21 reported that plaintiff' thyroid disorder was well-controlled by
 22 hormone therapy and was not a basis for disability. Tr. 819.

23 Regarding plaintiff's symptoms of diffuse myoclonus,
 24 hyperreflexia stiffness, and upper extremity numbness, the ALJ
 25 noted that the "examining sources were unable to find anything

27 ¹ See American Psychiatric Assoc., Diagnostic & Statistical
 28 Manual of Mental Disorders 34 (4th TR. ed. 2000) (DSM-IV-TR).

wrong." Tr. 29, 627-30. Dr. Dandy examined plaintiff in March and August 2002, and despite plaintiff's subjective complaints, was unable to find sufficient evidence of fibromyalgia and therefore unable to make a diagnosis. Tr. 625. In July 2002, Dr. Wheeler noted that plaintiff had exaggerated her responses to pain when he tested her reflexes and noted that her alleged dysfunctional level was "greatly disproportionate" to any objective findings and clinical laboratory findings. Tr. 740.

In October 2001, Dr. Boggs examined plaintiff and noted that her physical examination was essentially normal. Tr. 726-27. His impression was that plaintiff had symptoms of diffuse myoclonus, generalized hyperreflexia, and episodic bilateral upper extremity numbness, however, he was unable to support this statement with any diagnosis. Tr. 726. Dr. Boggs stated:

The patient's history is more consistent with myoclonus than it is with restless leg syndrome. The differential diagnosis is broad. Unfortunately, there is no easily correctable process such as a medicine intoxication or metabolic condition that the patient's symptoms can be attributed to. Certainly cervical stenosis is in the differential diagnosis as is demyelinating disease. The etiology of the patient's bilateral upper extremity numbness is unclear since she reports nerve conduction studies were negative in the past. Perhaps she has mild, functional compromise of the brachial plexus in the region of the thoracic outlet.

Id.

Further, an EEG was performed in July 2002, in response to plaintiff's complaint of "numerous myoclonic jerks." Tr. 723. The EEG was normal. Id. Dr. Boggs noted a relatively normal physical examination and stated that it was "hard to interpret all of what pt tells [due] to [psycho-]social factors involved." Tr. 721. In January and April 2003, Dr. Boggs' examination of

1 plaintiff was again essentially normal. Tr. 780-81.

2 In February 2003, plaintiff was examined by Dr. Daven who
3 noted that plaintiff's use of medications had significantly
4 improved her tremor symptoms. Tr. 745-46. Dr. Daven further
5 noted:

6 This patient has a mild postural tremor, but an
7 otherwise nonfocal neurological exam. She presents
8 with a history of intermittent myoclonic-like move-
9 ments and abnormalities of muscle tone, the etiology of
10 which is somewhat unclear. It is certainly possible
11 that there may be a familial tendency, although based
12 on the history it is certainly possible that this
13 might represent psychogenic myoclonus. I also
14 reassured the patient that I found no evidence of
15 parkinsonism on her examination today. At this point,
16 I doubt that this represents a degenerative disorder,
17 although since she has responded to treatment with
18 Kepra and Mirapex, I would recommend that those
19 medicines be continued for now[.]

20 Tr. 745.

21 Finally, in May 2003, plaintiff was examined by physicians
22 at an orthopedic clinic for symptoms of back and hip pain. Tr.
23 817-18. Dr. Van Anrooy and J. Stanko, PA-C, found that
24 plaintiff's examination was essentially normal. Id.
25 Specifically, they found that plaintiff's neck had "full range of
26 motion without pain;" her neurovascular was normal, her
27 musculoskeletal "back flexes to 90 degrees; [t]here is 15 degrees
28 of extension;" plaintiff's hip "is ranged through internal and
external rotation, flexion, and extension without any pain,
popping or catching, [s]he has an antalgic gait favoring her
right side." Tr. 818. Plaintiff's orthopedic hip exam was
"essentially normal," noting "mechanical back pain without
neurocompressive component." Id. The doctor's recommendations
were patient education, indocin, and home back exercises. Id.

1 Based on plaintiff's doctors' treatment notes, test
2 results, medical records, and opinions as reflected in the
3 record, I find that the ALJ's opinion limiting plaintiff's severe
4 disabilities to depressive disorder, anxiety disorder, and PTSD
5 is supported by substantial evidence. I find that plaintiff
6 failed to carry her burden to establish the existence of a severe
7 impairment, specifically myoclonic jerking, diffused myoclonus,
8 hyperflexia, episodic upper extremity numbness, degenerative disc
9 disease, and fibromyalgia, that prevented her from performing
10 substantial gainful activity, and that this impairment lasted for
11 at least twelve continuous months.

12 B. Plaintiff's Testimony

13 Plaintiff next asserts that the ALJ erred in finding
14 plaintiff's testimony not credible. Plaintiff's Opening Brief,
15 p. 14-16. Once a claimant produces objective medical evidence of
16 an underlying impairment or combination of impairments that could
17 reasonably be expected to produce some degree of pain or other
18 symptoms, and there is no affirmative evidence suggesting the
19 claimant is malingering, the ALJ may reject claimant's testimony
20 regarding the severity of the alleged pain or other symptoms only
21 by offering specific, clear, and convincing reasons for doing so.
22 Smolen, 80 F.3d at 1281-84; Bunnell v. Sullivan, 947 F.2d 341,
23 343 (9th Cir. 1991) (en banc) (once plaintiff produces medical
24 evidence of underlying impairment, ALJ may not discredit her
25 testimony as to the severity of symptoms merely because they are
26 unsupported by objective medical evidence).

27 The ALJ found that plaintiff's articulated inability to
28 perform work was inconsistent with the findings in the medical

1 reports. Tr. 26-30. In addition to the medical findings
2 discussed in the section above, the ALJ also noted that in July
3 2002, Dr. Wheeler examined plaintiff and opined that plaintiff
4 had "exaggerated responses to pain." Tr. 740. Dr. Wheeler
5 further opined that plaintiff's alleged dysfunctional level seems
6 "greatly disproportionate to objective physical findings as well
7 as the laboratory studies." Id. Finally, Dr. Wheeler suggested
8 that the reason for this was "secondary gain is a significant
9 factor since [plaintiff] is reapplying for disability." Id.

10 The ALJ also relied, in part, on the assessments of
11 Disability Determination Services (DDS) physicians, Dr. Kehrli
12 and Bill Hennings, Ph.D. Tr. 601-11. They evaluated the
13 evidence in the record and Dr. Kehrli opined that plaintiff's
14 impairments limited her to light work with some postural
15 limitations. Tr. 594-600. Dr. Hennings opined that plaintiff
16 could manage simple, two-step tasks, and "though [plaintiff] has
17 depression and a low energy level, she is still capable of
18 sustaining a full work day/week [without] extra supervision."
19 Tr. 611.

20 The ALJ also noted that plaintiff had failed to continue
21 with any mental health treatment or follow up. Tr. 28. See
22 Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) ("ALJ is
23 permitted to consider lack of treatment in his credibility
24 determination."). If plaintiff's mental condition was as
25 disabling as she alleged, it is logical to believe that she would
26 have sought treatment at some point for the symptoms she now
27 alleges are disabling.

28 ///

1 The record adequately supports plaintiff's allegations that
2 she experiences some limitations, however, I do not find support
3 for plaintiff's allegation that she is incapable of working due
4 to her impairments and/or symptoms. Plaintiff's credibility is
5 undermined by the lack of medical evidence to support the
6 severity of limitations she claims. See Tonapetyan v. Halter,
7 242 F.3d 1114, 1147-48 (9th Cir. 2001) (ALJ may not base
8 credibility determination of plaintiff's statements regarding
9 limitations solely on lack of objective evidence, however, when
10 combined with other evidence in the record it allows ALJ to draw
11 an adverse inference as to credibility).

12 In sum, given the fact that the ALJ is in the best position
13 to make a credibility finding, Fair v. Bowen, 885 F.2d 597, 604
14 (9th Cir. 1989), I find that the ALJ's credibility finding is
15 based on clear and convincing reasons supported by substantial
16 evidence in the record.

17 C. DDS Doctors' Assessments

18 At the request of the agency, Dr. Kehrli completed a
19 Residual Physical Functional Capacity Assessment on plaintiff on
20 November 21, 2001. Tr. 594. Dr. Kehrli opined that plaintiff
21 could frequently lift ten pounds and occasionally lift twenty
22 pounds, stand and/or walk six hours in an 8-hour day, and sit six
23 hours in an 8-hour day. Id. He determined that plaintiff could
24 only occasionally climb, balance, stoop and crouch and should
25 avoid concentrated exposure to hazards. Tr. 598.

26 Another state agency consultant, Dr. Bill Hennings,
27 completed a Psychiatric Review Technique also on November 21,
28 2001. Dr. Hennings found that plaintiff had suffered 1-2

1 repeated episodes of decompensation as a result of her major
2 depressive disorder, PTSD, and dependent personality traits with
3 history of alcohol and substance abuse. Tr. 606. Dr. Hennings
4 found plaintiff moderately limited in maintaining social
5 functioning and mildly limited in her activities of daily living
6 and maintaining concentration, persistence or pace. Id. On the
7 Mental Residual Functional Capacity Assessment of the same date,
8 Dr. Hennings noted plaintiff's moderate limitation in her ability
9 to understand and remember detailed instructions and to maintain
10 attention and concentration for extended periods, to work in
11 coordination with or proximity to others without being distracted
12 by them, to complete a normal workday and workweek without
13 interruptions from psychologically-based symptoms and to perform
14 at a consistent pace without an unreasonable number and length of
15 rest periods, to interact appropriately with the general public
16 and to set realistic goals or make plans independently of others.

17 Social Security Ruling 96-6p requires an ALJ to provide
18 reasons for rejecting the opinion of non-examining state agency
19 medical experts. The ALJ rejected the findings of Dr. Kehrli as
20 inconsistent with the "credible evidence of the record in the
21 record from treating sources." Tr. 31. Similarly, the ALJ
22 rejected the psychological limitations identified by Dr. Hennings
23 asserting that the "evidence did not show significant problems
24 interacting in public." Tr. 31. To support his conclusion, the
25 ALJ cites plaintiff's relationship with her mother, brother,
26 children and grandchildren and her activity of eating out and
27 occasional shopping. Id. The ALJ also cites plaintiff's pre-
28 disability employment as a cashier and waitress in further

1 support of his conclusion that plaintiff is not psychologically
2 or socially impaired. Id.

3 Dr. Kehrli reviewed the medical record and concluded that
4 plaintiff was limited to light work with some non-exertional
5 postural limitations. Tr. 594-600. The ALJ noted that the
6 additional limitations identified by Dr. Kehrli were not
7 supported by the record as a whole. Tr. 26-30. The ALJ found
8 that no other evidence in the record supported Dr. Kehrli's
9 additional postural limitations, therefore the ALJ did not adopt
10 that portion of his opinion in his residual functional capacity.
11 Tr. 30-31. I find no error here. See Magallanes v. Bowen, 881
12 F.2d 747, 753 (9th Cir. 1989) (ALJ may accept some, but not all,
13 that an expert says).

14 Regarding Dr. Hennings' statement that plaintiff had
15 moderate difficulties with social functioning, the ALJ met his
16 burden by setting out a detailed and thorough summary of the
17 facts and conflicting clinical evidence, and made findings based
18 on that record. Tr. 26-30. The ALJ did, however, adopt Dr.
19 Hennings' assessment that plaintiff could perform simple, two-
20 step tasks and persist at work on a regular and continuous basis.
21 Tr. 30, 601-11.

22 In sum, I find that the ALJ properly evaluated the medical
23 opinions contained in the record.

24 D. Residual Functional Capacity and Return to
25 Past Relevant Work

26 Plaintiff asserts the ALJ erred in determining she could
27 perform simple tasks. Tr. 26-32. The residual functional
28 capacity finding represents the most that an individual can do.

1 See SSR 96-8p (assessment must first identify individual's
2 functional limitations or restrictions and then assess work-
3 related abilities on a function-by-function basis). The ALJ is
4 thus required to explain how the evidence supported his
5 conclusions. The ALJ met this requirement by properly accounting
6 for all of plaintiff's credible limitations.

7 Finally, the plaintiff asserts that the ALJ erred in his
8 determination that plaintiff could perform her past relevant
9 work. The regulations hold that a claimant has the burden of
10 showing that she can no longer perform her past relevant work.
11 See 20 C.F.R. § 416.920(e). At step four, the ALJ is required to
12 make findings as to plaintiff's residual functional capacity, the
13 physical and mental demands of her past jobs, and whether her
14 residual functional capacity would permit her to return to her
15 past jobs. SSR 82-62. Plaintiff has the burden to produce
16 evidence at this step. Tackett, 180 F.3d at 1098-99. Plaintiff
17 did not meet this burden, and conversely, the ALJ's step four
18 finding that plaintiff could perform her past relevant work as a
19 cashier and waitress was supported by substantial evidence in the
20 record. Tr. 26-31. Moreover, the ALJ was not required to seek
21 a vocational expert's opinion as to whether a hypothetical person
22 with plaintiff's residual functional capacity could perform her
23 past relevant work. Plaintiff's Brief, p. 13-14. See Miller v.
24 Heckler, 770 F.2d 845, 850 (9th Cir. 1985) ("The Secretary is
25 required to produce vocational evidence only when the claimant
26 has shown that he or she cannot perform any previous relevant
27 work."). Further, when "documentation and vocational resource
28 material are not sufficient to determine how a particular job is

1 usually performed," it may be necessary to consult a vocational
2 expert. SSR 82-61. Because sufficient information was available
3 here the ALJ properly evaluated the evidence and determined
4 plaintiff could perform her past relevant work.

5 **CONCLUSION**

6 The Commissioner's decision is based on substantial
7 evidence and adopted by this court. This case is dismissed.

8 IT IS SO ORDERED.

9 Dated this 31 day of July 2006.

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12
13 /s/ Ann Aiken

14 Ann Aiken
United States District Judge